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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ISAIAH ANTHONY QUINONEZ, Defendant and Appellant.	F077796 (Super. Ct. No. 16CR07924) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Robert C. Nash and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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While Isaiah Anthony Quinonez held a convenience store clerk at gunpoint, his companion stole two cigarette packages from behind the counter. He was convicted of two crimes including robbery with firearm enhancements.

SEE CONCURRING AND DISSENTING OPINION

Quinonez now alleges instructional error relating to his robbery conviction. He also challenges the fines and fees imposed as part of his sentence. We affirm.

BACKGROUND

Charges

The Merced County District Attorney charged Quinonez with three crimes: Robbery of the store clerk (Pen. Code, § 211;[1] count 1), assault with a firearm (§ 245, subd. (b); count 2), and robbery of a transient male outside the store (§ 211; count 3). Count 1 included an enhancement for personal discharge of a firearm causing great bodily injury (§ 12022.53, subd (d)). Count 2 included enhancements for personal use of a firearm (§ 12022.5, subd. (a)) and personal infliction of great bodily injury (§ 12202.7, subd. (a)).

Trial Evidence

Quinonez, along with two companions, went to a convenience store early one morning just before 3:00 a.m.. Outside the store, the trio encountered a transient male and attacked him. Quinonez and an unidentified companion then entered the store.

Quinonez held the store clerk at gunpoint and demanded money. The unidentified male went behind the clerk and stole cigarettes. The third male stood watch outside. Quinonez then shot the clerk in the neck, breaking his clavicle, a rib, and collapsing his lung. The trio fled but Quinonez was apprehended minutes later.

Verdict and Sentence

Quinonez was convicted of robbery and assault with a firearm against the store clerk. The firearm enhancements were found true. He was acquitted of the charge

[1] Undesignated statutory references are to the Penal Code.

against the transient male.[2] He was sentenced to serve 30 years to life in prison. The sentence included $10,140 in fines and fees.

DISCUSSION

Quinonez raises two claims on appeal. First, he alleges the trial court erred by instructing the jury with uncharged conspiracy liability. Second, he argues the court erroneously imposed fines and fees without first determining his ability to pay. We reject each contention.

I. The Conspiracy Instructions Were Proper

Quinonez claims the evidence did not warrant instructions regarding uncharged conspiracy liability. We disagree.

A. Additional Background

The court instructed the jury, at the People's request, it could find robbery proven by alternative liability theories: aiding and abetting or uncharged conspiracy. The uncharged conspiracy instruction explained, as relevant:

> "The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.
>
> "To prove that the defendant was a member of a conspiracy in this case, the People must prove that: One, the defendant intended to agree and did agree with [another person] to commit robbery; two, at the time of the agreement, the defendant and one or more of the alleged members of the conspiracy intended that one or more of them would commit robbery ….
>
> [¶] … [¶]

[2] The robbery charge against the transient male was amended during the trial to simple battery (§ 242). Quinonez was ultimately acquitted of both battery and the lesser included offense of assault.

> "The People must prove that the members of the alleged conspiracy had an agreement and intent to commit robbery. The People do not have to prove that any members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime.
>
> "An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.
>
> [¶] … [¶]
>
> "A member of a conspiracy is … criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of a conspiracy. This rule applies if the act was not intended as part of the original plan."

The court also instructed the jury with standard aiding and abetting principles. Those instructions are not at issue.

B. Analysis

" '[U]ncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator.' " (*People v. Valdez* (2012) 55 Cal.4th 82, 150.) For uncharged conspiracy liability to attach, the defendant must 1) agree, informally or formally, with a coconspirator to commit a target crime and 2) the coconspirator commits a separate crime 3) that is reasonably foreseeable and 4) is in furtherance of the conspiracy. (*People v. Prieto* (2003) 30 Cal.4th 226, 249-252; see *People v. Covarrubias* (2016) 1 Cal.5th 838, 902 [" 'natural and probable' and 'reasonably foreseeable' are equivalent concepts."].)

The question here is not whether the evidence actually proved each element of the uncharged conspiracy. That is a question for the jury. The question presented is whether substantial evidence justified the instruction. (*People v. Leon* (2020) 8 Cal.5th 831, 848 [" 'A trial court must give a requested instruction only if it is supported by substantial

evidence, that is, evidence sufficient to deserve jury consideration.' "].) We conclude the evidence sufficiently warranted the instruction.

The evidence supported the following reasonable inferences. Quinonez acted in concert with two individuals. Under cover of darkness, the trio went to the convenience store together. After arriving, they first neutralized a potential witness. Quinonez and one individual then entered the store together and continued to act in concert by directly and immediately contacting the remaining obstacle, i.e., the store clerk. The third individual served as a lookout. After the unidentified individual stole the cigarettes, Quinonez shot the clerk and the trio fled together. These facts support a reasonable inference of a coordinated plan and constitute substantial evidence of an informal agreement to commit robbery.

The unidentified individual committed a completed robbery by stealing the cigarettes while Quinonez held the clerk at gunpoint. Quinonez does not argue otherwise.

The evidence strongly suggests the plan was to steal the cash in the register. It is reasonably foreseeable that committing a robbery in a convenience store may result in secondary robberies. These secondary robberies might range from neutralizing witnesses to obtaining other valuable merchandise or property in the store whether for personal consumption or gain. A plan to commit robbery at a convenience store for cash, especially a plan amongst juveniles, might reasonably result in the additional theft of cigarettes.

The evidence also substantially supports the cigarettes were taken in furtherance of the conspiracy. By taking the cigarettes from behind the counter, the two robbers instilled fear in the victim and placed the victim in a vulnerable position. The victim realized the robbers were serious threats. Instilling fear and surrounding the victim increased the odds of successfully completing the robbery.

In conclusion, the evidence justified giving the uncharged conspiracy instruction. We reject the contrary contention.

II. The Fines and Fees Were Properly Imposed

In addition to sentencing Quinonez to serve 30 years to life in prison, the trial court imposed a $10,000 restitution fine (§ 1202.4), an $80 operations fee (§ 1465.8), and a $60 criminal assessment fee (Gov. Code, § 70373). He now argues "[t]he trial court imposed these assessments and fines on [him] without first making a determination that he had the ability to pay them" and thereby denied him due process. The People claim Quinonez forfeited this claim because he did not object in the trial court. Alternatively, the People argue the fines and fees were neither excessive under the Eighth Amendment nor do they implicate due process.

We conclude Quinonez's due process rights were not violated because the trial court was required to take into account his ability to pay the restitution fine.[3] Nothing in the record indicates the trial court disregarded its duty to consider ability to pay. We further conclude Quinonez has not adequately raised an Eighth Amendment claim.

A. Due Process

When setting the section 1202.4 restitution fine above $300, the trial court is required to consider "the defendant's inability to pay …." (§ 1202.4, subd. (d).) "Express findings by the court as to the factors bearing on the amount of the fine shall not be required." (*Ibid*.)

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[3] Some courts have held a defendant has no due process rights relating to fines and fees. (E.g., *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 928-929 [distinguishing facts underlying a due process challenge].) We take no position on the issue because there is no possible error in this case. For the same reason, we take no position on whether the forfeiture rule applies to a due process challenge. (See, e.g., *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153 [failure to object constitutes forfeiture]; *People v. Lowery* (2020) 43 Cal.App.5th 1046, 1053-1054 [same].)

" '[A] trial court is presumed to have been aware of and followed the applicable law.' [Citations.] This rule derives in part from the presumption of Evidence Code section 664 'that official duty has been regularly performed.' Thus, where a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order." (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114; *People v. Sullivan* (2007) 151 Cal.App.4th 521, 550.)

Here, the trial court imposed the maximum restitution fine. In so doing, the court was required to consider Quinonez's inability to pay. We presume the court fulfilled its obligation and the record does not indicate otherwise.

A trial court's unilateral consideration of a defendant's inability to pay does not, of course, perfectly substitute for an actual hearing on the issue. Quinonez, however, raises no due process concern other than consideration of ability to pay. For example, he does not contend his convictions result from a compounding inability to pay fines and fees. (See *People v. Duenas* (2019) 30 Cal.App.5th 1157, 1163-1164 [explaining "cascading consequences of imposing fines and assessments that a defendant cannot pay"].) Nor does he raise an "access to the courts" claim. (See *id.* at p. 1165.)

The trial court here necessarily considered Quinonez's ability to pay prior to imposing the maximum fines.[4] Accordingly, the $10,140 total fine satisfies due process.

B. Excessive Fines and Fees

Quinonez offers no meaningful argument relating to the Eighth Amendment's prohibition against excessive fines or to our state Constitution's counterpart. Indeed, the

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[4] The trial court was required only to consider inability to pay relative to the $10,000 restitution fine. After considering ability to pay, the court determined increasing the restitution fine to the statutory maximum—a $9,700 increase—was appropriate. It would stretch credulity to suggest the remaining $140 in fines would result in a different conclusion. Indeed, Quinonez was aware he bore "the burden to demonstrate his … inability to pay" yet presented neither argument nor evidence regarding the fines at his sentencing hearing. (§ 1202.4, subd. (d) ["A separate hearing for the restitution fine shall not be required."].)

People were the first to raise the issue on appeal. "[W]e decline to review" the fines and fees "under the excessive fines clause of the Eighth Amendment as urged by the" People. (*People v. Petri* (2020) 45 Cal.App.5th 82, 87; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration."].)

In any event, the fines and fees imposed here are not excessive. Determining whether a fine is excessive requires examining the following factors: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728 (*Lockyer*).)

Quinonez was the primary culprit in this crime. He pulled the trigger and shot the victim in the neck, shattering his clavicle, breaking a rib, and collapsing his lung. The fines and fees are applicable to all felony convictions in this state. Because the court imposed more than the minimum restitution fine, the court necessarily considered Quinonez's ability to pay, "the seriousness and gravity of the offense and the circumstances of its commission," and the victim's losses. (§ 1202.4, subd. (d).)

Again, a trial court's unilateral consideration of inability to pay is not perfectly equivalent to a full hearing on the issue. Ability to pay, however, is a singular factor—not a bar—to imposing a fine. An aggregate $10,140 fine is in no way disproportionate to the senseless robbery and egregious shooting in this case. (See *Lockyer, supra,* 37 Cal.4th at p. 728 [proportionality is the touchstone of Eight Amendment analysis]; see also *People v. Potts* (2019) 6 Cal.5th 1012, 1056 [$10,000 restitution fine not automatically invalid simply because a defendant cannot pay].)

CONCLUSION

The result we reach in this case is centered on the fact the court imposed a restitution fine higher than the minimum under section 1202.4. In this circumstance, the

court was required to consider inability to pay. The trial court is presumed to fulfill its obligations in the absence of contrary evidence. We express no opinion on the questions or answers presented in cases where, instead, the minimum section 1202.4 restitution fine is imposed.

DISPOSITION

The judgment is affirmed.

SNAUFFER, J.

I CONCUR:

FRANSON, Acting P.J.

SMITH, J. – Concurring and Dissenting.

In keeping with *People v. Son* (2020) 49 Cal.App.5th 565, petition for review pending, petition filed June 29, 2020, S262701 (lead opn. of Smith, J.), I would find that appellant is entitled to a determination of ability to pay with regard to the court operations fee pursuant to Penal Code section 1465.8 and the criminal assessment fee pursuant to Government Code section 70373. In all other respects I concur with the majority and vote to affirm.

SMITH, J.